

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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Hon. Magalie Roman Salas
Secretary
Federal Communications
Commission
445 12th Street, S.W., TWA-325
Washington, D.C. 20554

Re: In the Matter of Establishment of Rules to Prohibit
the Imposition of Unjust, Onerous Termination Penalties
on Customers Choosing to Partake of the Benefits of
Local Exchange Telecommunications Competition -
CC Docket No. 99-142

Dear Secretary Salas:

Enclosed is an original and seven copies of the
Comments of the New York State Department of Public Service in
the above-captioned proceeding. In addition, a copy was filed
using the Commission's Electronic Comment Filing System and
copies were sent to all parties on the attached service list.

Sincerely,

Lawrence G. Malone
General Counsel

Enclosure
cc: All Parties

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

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In the Matter of

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Prohibit the Imposition of)
Unjust, Onerous Termination)
Penalties on Customers)
Choosing to Partake of the)
Benefits of Local Exchange)
Telecommunications Competition)

CC Docket No. 99-142

COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

Lawrence G. Malone
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Of Counsel

Nancy Russell
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Dated: June 3, 1999
Albany, New York

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

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COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service submits these comments in response to KMC Telecom Inc.'s (KMC) petition for a declaratory ruling (DA 99-836) in the above-captioned proceeding. KMC asks the Commission to: (1) declare unlawful termination penalties imposed by incumbent local exchange carriers (ILECs); (2) prohibit enforcement of ILEC termination penalties; and (3) require the removal of ILEC termination penalties from ILEC state tariffs until such time as customers have a more genuine competitive choice than currently exists. KMC argues that Section 253 of the Act provides the Commission authority to declare ILEC termination penalties unlawful.

The Commission should deny KMC's petition. Section 253 provides the Commission with limited ability to preempt a state's actions; it does not empower the Commission to issue a blanket preemption ruling on termination penalties. Section 253 contemplates that determinations to preempt are to be made on a

case-by-case basis, and therefore, KMC has failed to establish that all ILEC termination penalties, as a matter of law, constitute barriers to entry. Moreover, Congress plainly provided that an impediment to entry is not necessarily a "barrier."

Section 253 Of The Act Does Not Provide
The Commission With Jurisdiction To Issue
A Blanket Preemption Ruling.

KMC requests that the Commission declare unlawful any state policy allowing ILEC termination penalties. KMC argues that all such penalties are "barriers to entry" and, thus, the Commission has the authority to preempt under Section 253 of the Act.

In drafting Section 253, Congress balanced the states' protection of local interests in universal service and health and safety against the national interest in local competition.¹ In so doing, it specifically limited the Commission's preemptive

¹Section 253 of the Act, "Removal of Barriers to Entry," states:

- (a) In General.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
- (b) State Regulatory Authority.- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

authority by detailing the actions the Commission must take prior to a determination to preempt.¹

The plain language of this section does not empower the Commission to preempt a general category of state legal requirements, nor does it allow the Commission to preempt all states in a single proceeding. Preemption must be narrowly tailored to address the specific state regulation.² Furthermore, Congress recognized that an impediment to entry is not

¹Section 253(d) states:

- (d) PREEMPTION -- If, after notice and an opportunity for public comment, the Commission determines a State or local government has permitted or imposed any statute, regulation, or legal requirements that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

²The New York Commission has not yet ruled on the lawfulness of a termination penalty. It has, however, determined that the valid assignment of a contract from an end user to a reseller does not terminate the contract. *Complaint and Request of CTC Communications, Inc. for Emergency Relief Against New York Telephone d/b/a Bell Atlantic-New York for Violations of Section 251(c)(4) and Section 252 of the Communications Act of 1934, as amended, Section 91 of the N.Y. Pub. Serv. Law (September 14, 1998) and Resale Tariff PSC No. 915, Case 98-C-0426, Order Granting Petition, 1998 WL 869313 (N.Y. P.S.C); Case 98-C-0426, Order Denying Motion to Compel and for Sanctions and Clarifying the Order Granting Petition (February 1, 1999).*

necessarily a "barrier."¹ KMC has not shown that all ILEC termination penalties were imposed to bar competitors from entering the local market. Rather, KMC's own petition concedes that some of these penalties may be imposed for legitimate reasons (KMC petition at p. 3; ILECs often offer special discounted rates for services like Centrex, if the end user commits to receive service for a specified amount of time).²

Moreover, even when preemption may be appropriate, Congress limited the Commission's preemptive power to "the extent necessary to correct such violation or inconsistency."³ KMC does not ask that ILEC termination penalties be limited in duration or to certain monetary amounts, rather KMC asks that they be declared unlawful per se. As KMC fails to present any evidence that declaring these penalties unlawful is "necessarily" the only

¹The Conference Report on S. 652, 104 Cong., 2d Sess., noted that Congress' "intent was to leave protected state regulatory authority, and leave protected local government authority, but there have to be some cases of preemption or a certain city could impose a requirement of some sort or another that would be very anticompetitive." S.R. Conf. Rep. No. 104-230 at 126-127. "Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility customers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section." Id. at p. 127.

²There are also other legitimate reasons. For example, termination penalties may be imposed because a particular end user who committed to receive the service for a specified amount of time also received a special discounted rate in the bargain. Penalties may also be imposed as a result of expenditures associated with a contract. An ILEC may have amortized its investment in the cost of facilities, such as ISDN, in consideration of expenses specifically incurred to serve a particular customer and in reliance upon bargained for future performance by such customer.

³See 47 U.S.C. §253(d).

way to remove an alleged barrier to entry, preemption must fail. See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987) (The court held that preemption is permitted only if there is no possible set of conditions which the state could place on its regulatory requirements that would not conflict with federal law.)

Conclusion

The Commission should deny KMC's petition for declaratory ruling. The Commission should not impair its working relationship with the states by issuing a blanket ruling preempting state action under the auspices of its Section 253 authority.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lawrence G. Malone".

Lawrence G. Malone
General Counsel

Dated: June 3, 1999
Albany, New York

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CERTIFICATE OF SERVICE

I, Lucille T. Dillenbeck, hereby certify that an original and seven (7) copies of comments in the above-captioned proceeding were sent via Airborne Express to Magalie Roman Salas, Secretary of the Federal Communications Commission. In addition, a copy was filed using the Commission's Electronic Filing System and copies were sent by First Class Mail, postage prepaid, to all parties on the attached service list.


Lucille T. Dillenbeck

Dated: June 3, 1999
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